In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-3

KERRY M. GOUGH, Trustee in Bankruptcy of Louis Rosen,
dba Walnut Creek Furniture,
Petitioner,

vs.

ROSSMOOR CORPORATION and CRESTMARK CARPET
AND DRAPERY CO.,
Respondents.

PETITIONER'S REPLY MEMORANDUM

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Table of Authorities Cited

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In its brief in opposition, respondents assert (1) that issues raised in the petition are not ripe for review because all that is required is for the district court to hold hearings on the respondents' motions for new trial or judgment *n.o.v.*, (2) that the Court of Appeals could remand properly to the District Court a motion for judgment *n.o.v.* when such a motion is raised for the first time in a Petition for Rehearing to the Court of Appeals, and (3) that the Court of Appeals' decision in *Gough I* (App. B to Petition) did not include a ruling on the respondents'

Motion for New Trial or Judgment *n.o.v.* presented in their Petition for Rehearing. None of these suggestions has merit.

1. Respondents' argument that the action is not ripe for review, ignores this Court's direction to the Court of Appeals in *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317 (1967) to decide motions, properly presented, in a Petition for Rehearing and involving questions of law as to which the Court of Appeals is as well prepared as the trial court to rule upon, or to remand, if necessary, to the trial court with specific directions to hold hearings. It ignores the complete record before the Court of Appeals in *Gough I* and the court's opinion. The trial court acknowledged the issues raised by respondents in their motion were questions whose final determination is regularly made by the Court of Appeals (Cr. 611-612). Under *Neely*, this action should be concluded by this Court.

2. Respondents' argument as to the propriety of the remand for consideration of their motion for judgment *n.o.v.* is no more persuasive. Respondents' arguments as to their motion for judgment *n.o.v.* fail to consider the principle set forth in *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212 (1947) and *Johnson v. New York, N.H. & H.R. Co.*, 344 U.S. 48 (1952), repeated in *Neely*, that strict compliance with the provisions of Rule 50(b) is a prerequisite to entry of judgment *n.o.v.* Respondents were not precluded from making a motion for judgment *n.o.v.* in the trial court following the entry of judgment on the jury's answers to special interrogatories. Rule 50 (b) permits *any party* who has moved for a directed verdict to move to have the verdict and any judgment

thereon set aside in accordance with his motion for directed verdict. There are no limitations on respondents' ability to have moved for judgment *n.o.v.* as to the contrary verdict and judgment entered upon the jury's answers to special interrogatories number 1, 2, 4 and 5 which found violation, impact and damages under the antitrust laws.

Without such a motion in the trial court, respondents were limited under Rule 50(d) to setting forth grounds on appeal as to why a new trial should be granted if their judgment was reversed. Strict compliance with Rule 50(b) eliminates needless successive appeals, presents the issue to the trial judge, and still recognizes the right of an appellee to seek a new trial if his verdict is set aside on appeal.

3. Finally, this Court should not seriously entertain respondents' contention that this Court not determine whether the opinion in *Gough I* included a determination on the merits of respondents' motions contained in their Petition for Rehearing but rather the two motions should be returned to the trial court for its initial consideration and further appeals. This Court, of course, has the power to interpret the mandate in *Gough I* notwithstanding the Court of Appeals' interpretation and direction to the trial court in *Gough II*. *Federal Communications Com'n. v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940). Expeditious resolution of all issues in an action will be advanced by this Court's application of *Neely* to the opinion in *Gough I* to hold the respondents' motions, if properly presented, were determined on the merits. This issue has broad application to avoid delay by appellees in presenting

issues and requiring prompt resolution in the Court of Appeals.

Justice requires that installment appeals and arguments be foreclosed and this litigation brought to its proper end. The Petition should be granted.

Dated, August 9, 1976.

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